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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 551 ...

FETZER TELEVISION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JUDGMENT OF CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14,418

FETZER TELEVISION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BEFORE: MILLER, Chief Judge, McALLISTER and WEICK, Circuit Judges.

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of counsel in open court, and it appearing that petitioner objects to the enforcement of the order of the National Labor Relations Board on the ground that it is not supported by substantial evidence on the record as a whole, and that the order of the Board is invalid because it is too broad; and the court being duly advised,

Now, therefore, it is ADJUDGED and DECREED that the Board's order was sustained by the evidence on the record as a whole; that the order was invalid and proper under the circumstances of this case; and it is further decreed that the petition of the Board for enforcement of its order be and is hereby granted.

APPROVED FOR ENTRY:

Thomas F. McAllister,
United States Circuit Judge.

A True Copy

Attest:

Carl W. Reuss,
Clerk.
By Mary M. McAfee,
Deputy Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. .....

FETZER TELEVISION, INC.,
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vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

FETZER TELEVISION, INC., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on October 12, 1961.

OPINIONS BELOW

The Opinion of the Circuit Court of Appeals for the Sixth Circuit is set forth in the certified record on Petition for Writ of Certiorari under title "PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT." (NLRB Order is at 70a and 121a).

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on October 12, 1961, and jurisdiction of this Court is invoked under 28 *U. S. C. A.* §1254 (1). Order Staying Mandate was issued October 27, 1961, granting a stay of 30 days, subject to further order of the court. Jurisdiction of Circuit Court of Appeals was in accordance with 29 *U. S. C. A.* §160 (f).

QUESTIONS PRESENTED

(1) Where evidence of alleged unfair labor practices occurring within the six months limitation period provided by Sec. 10 (b) of the NLRB Act is not substantial and is not supported by substantial evidence on the record as a whole, may such practices and the charges based thereon be "bolstered" or established by prior time-barred events, antedating the limitation period fixed by the Statute, and may such time-barred events be admitted as evidence of alleged union "hostility"?

Circuit Court of Appeals — Yes.
Petitioner — No.

(2) Does the formal withdrawal of unfair labor practice charges made with the consent of the Regional Director of the NLRB, following investigation by the Board, bar further proceedings before the Board as to such charges, and bar the admission in evidence in a subsequent case of acts upon which the withdrawn charges were based?

Circuit Court of Appeals — No.
Petitioner — Yes.

(3) Where there is no substantial evidence based upon the record as a whole showing need or justification for a broad restrictive order, is the Labor Board order too broad, which: (a) Enjoins discouraging membership in or activities on behalf of the charging Union, "or any other labor organization," and enjoins against "or in any manner" discriminating against employees; (b) En-

joins against threats of discharge or reprisals if employees join or assist the above named labor organization "or any other labor organization," or select such labor organization as the bargaining representative; and (c) Enjoins against "in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Sec. 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Sec. 8 (a) (c) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959?

Circuit Court of Appeals – No.
Petitioner — Yes.

(4) Is the expression of opinion by supervisors privileged under 29 *U. S. C. A.* §158 (c) of the Act?

Circuit Court of Appeals — No.
Petitioner — Yes.

(5) Whether substantial evidence based upon the record as a whole, supports the findings and conclusion of the NLRB that the employer discriminatorily changed working conditions of the employee Stone by means of reduction of maintenance work?

Circuit Court of Appeals — Yes.
Petitioner — No.

STATUTES INVOLVED

Sec. 10 (b) NLRB Act — 29 *U. S. C. A.* §160 (b):

> "• • • Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, • • •."

29 *U. S. C. A.* §160 (f):

> "* * * the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

29 *U. S. C. A.* §158 (c):

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Regulations of NLRB re Withdrawal — Par. 115.09 (Series 8):

> "Who may file; withdrawal and dismissal. — A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to Sec. 102.45, upon motion, with the consent of the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to Sec. 102.45, upon motion, with the consent of the Board. *Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board.*" (Italics ours).

STATEMENT

Petitioner, FETZER TELEVISION, INC., purchased Television Station WWTV at Cadillac, Michigan, in September, 1958. Upon petition of the union of National Association of Broadcast Employees and Technicians (AFL-

CIO) (hereinafter called the Union), the NLRB held a representation election on October 23, 1959, which the Union won by a vote of 11 to 4 (73a). Following the election the Union filed unfair labor practice charges against the Company and General Counsel issued a complaint on January 14, 1960, charging various acts of coercion and interference by the employer.

Claimed acts of coercion are based upon certain conversations between employees and supervisors occurring for the most part prior to the election which was won by the Union. On August 14, 1959, the date of the NLRB hearing on the Union's petition for a representation election, the Union stated it wished to call one of petitioner's employees as a witness. As an accommodation to the Union, a supervisor offered to, and did, telephone the desired employee (Dawn Peckham, nee Kennedy) and requested that she come to the hearing as a witness for the Union. Subsequent stipulation by the parties at the hearing made such appearance unnecessary and the supervisor again telephoned the employee, telling her that now it was not necessary to appear. When the supervisor returned to the Company following the hearing, this employee inquired "what all the trouble was about," and the supervisor replied "it was mostly caused by Quintan Dailey * * * a trouble maker * * * always trying to get the Union in, and that if he (Dailey) wasn't such a good engineer * * * he would have been discharged long ago." Subsequent unfair labor practice charges were filed against the Company on September 10, 1959 (7 C. A. 2511), charging interference, restraint and coercion of employees by the Petitioner through threats, interrogation and discrimination against this particular employee whom the supervisor had telephoned. Following investigation by the NLRB those charges were formally withdrawn on November 5, 1959 (40a).

Approximately two months later, and about two weeks prior to the representation election, one of the employees in the bargaining unit tried to get a newly appointed supervisor to express his opinion as to unions. This supervisor was not only newly appointed, but he exercised no supervisory authority over either the questioning employee, or any other employees, within the bargaining unit. When this

supervisor came into a room where the employee was working alone, the employee began his conversation by asking the supervisor about unions (43a), and then asked what the new supervisor thought about the coming election. The new supervisor said "Gene (the general manager) wasn't going to stand for — that he wouldn't monkey around with the guys this time like he did a year ago; that he'd — well, as Paul put it, chop-chop; we'd be going down the old country road" (43a). The employee admitted that this form of expression and speech vernacular was a very frequent and favorite figure of speech of this newly appointed supervisor. This statement was clearly an expression of personal opinion privileged by the Act — 29 *U. S. C. A.* §158 (c) —

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Coupled with these incidents, the trial examiner admitted into evidence, and the United States Circuit Court of Appeals condoned, the use of testimony of an event which occurred more than six months prior to the unfair labor practice charges in the instant case.

Over objection, testimony was admitted of remarks of a supervisor made more than six months prior to the filing of the charges to the effect that there was "one rat" who invited the union in, and that the supervisor would get rid of him in time.

It is the position of the Petitioner that where the evidence of alleged unfair labor practices marshalled from within the six month period is not substantial, and is not supported by substantial evidence on the record as a whole, that the allegations in the complaint cannot be established by reliance on the time-barred events preceding the six months period prior to the filing of the charges in the instant case. Despite the six month statute, 29 *U. S. C. A.* §160 (b) — Sec. 10 (b) of the Act — as to use of time-barred events, the Board by use of time-barred evidence

to "bolster" a finding of union animosity found, and the Circuit Court of Appeals sustained a finding, that Petitioner had threatened its employees and had discriminatorily changed the duties of employee Gordon Stone. The Board thereby based its findings of threats of reprisal and interference on time-barred evidence contrary to decisions of this Court and the Statute.

Employee Stone was removed from camera work effective with Monday, October 26, 1959. This change he protested, but the trial examiner found that the change resulted from Petitioner's properly adopted policy of using engineers instead of untrained personnel to operate camera for television broadcasting, for reasons of efficiency and in keeping with policy of Petitioner's other affiliated stations (91a). Thereafter during the week of October 26, through October 30, employee Stone completed the cutting of a doorway through a cement block wall at the transmitter building (25a), and on October 30, by memorandum, he was notified that the Company was making changes in its engineering department, and changes which would affect Stone, and that Stone was to be responsible only for the proper clean-up, waxing, etc. of the transmitter building in its entirety. At this time Stone was still protesting his removal from camera, and it is now claimed that this memorandum discriminatorily reduced Stone's building maintenance work.

This finding is in direct contradiction to the testimony of the general manager that Stone's duties had not been changed; Stone's own testimony that he did building maintenance work only when there was such work which needed to be done, and that no building maintenance work of any substantial proportion was ever done without express approval at any time, and that after the issuance of the memorandum Stone worked a full 40 hours on the doorway — by request cut a ventilator opening — and was assisting in maintenance work in the roof when he was injured in January, 1960. These facts, coupled with the significant fact that no other maintenance work was performed at the transmitter building by any other person from time of the receipt of the memorandum by Stone to the time of his disablement. We, therefore, say that there is no substantial evidence based upon the record as a whole that Stone's maintenance duties were discriminatorily reduced or actually reduced in any way.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Petitioner is now subject to the broad sweeping injunctive terms of an all inclusive order of the NLRB, which is subject to immediate enforcement action by contempt proceedings in the Circuit Court of Appeals. Because of the threat of contempt action, Petitioner seeks review for the reasons herein set forth.

(1) Without the "bolstering" effect of time-barred evidence, there is no justification for entry of any order against Petitioner, let alone the broad sweeping blanket order to which Petitioner is now subject. In the case of *International Machinists vs. NLRB*, 362 U. S. 411, this Court ruled that Sec. 10 (b) of the National Labor Relations Act was a rule of evidence, and that the policy of the six month limitation section of the Act was to bar litigation over past events and to stabilize existing bargaining relationships. In that case, this Court touched on but refused to pass directly on the problem here presented by this case, namely, that if the evidence within the permissible period is not substantial, may the merit of the allegations in the complaint be shown by reliance on earlier events otherwise barred by the six month limitation period of the Statute.

In the case here before the Court the isolated statements of the two supervisors, which occurred within the permissible period were made in response to inquiries by employees under different and entirely separate circumstances, and if not exempt as statements of opinion, do not amount to substantial evidence of unfair labor practices. Without the effect of time-barred conversation of May 12, 1959, occurring prior to the six month limitation period, there is no substantial evidence based on the record as a whole of any unfair labor practice on the part of Petitioner. The clear acceptance and "bolstering" effect of the time-barred evidence "as evidence of union animus" results in making the findings of unfair labor practices dependent upon time-barred events, although those events themselves cannot be the subject of a complaint. By using this time-barred evidence to determine the claimed union hostility of Petitioner, the Board has no trouble thereafter of finding Petitioner guilty of the acts charged. This is contrary

to the intended scope of *Local 1424 International Machinists vs. NLRB*, 362 U. S. 411.

(2) An important question properly raised before the trial examiner, the Board, and the Circuit Court of Appeals, was whether or not the Board was foreclosed from considering the evidence of acts which occurred prior to the withdrawal of prior unfair labor practice charges. In a prior case No. 7 C.A. 2511, the Petitioner was charged with interference, restraint and coercion of its employees through threats, interrogation and alleged discrimination against employee Dawn Kennedy Peckham, with whom a supervisor had a conversation at the request of the Union, on the day of the representation hearing, in which the supervisor is alleged to have said that "Quintan Dailey was a trouble maker, and if he was not such a good engineer he would have been discharged long ago."

During the hearing in the case here before the Court, counsel for the General Counsel introduced evidence relating to the charges in the previously withdrawn complaint. Objection was overruled and the evidence received. We believe the policy of the Act, as well as general common law rules raise an equitable estoppel against such past charges and require that if a charge is formally dismissed with the consent of the Regional Director of the NLRB following investigation of the facts, that thereafter the Board and the General Counsel should be precluded from offering or considering evidence of acts on which the withdrawn charges were based. The regulations of the Board provide that withdrawal of such charges may only be made with the consent of the Regional Director, Trial Examiner, or the Board, and that "upon withdrawal of any charge, any complaint based thereon shall be dismissed by the Regional Director issuing the complaint, the Trial examiner designated to conduct the hearing, or the Board" (Par. 1115.09, Sec. 102.8 Regulations, Series 8). While we say that the withdrawal of these charges concedes there was no substantial evidence that petitioner, through its supervisors, had threatened or interfered with the rights of the employees Kennedy or Dailey, or any other employees, we also say that such withdrawal bars further proceedings or evidence before the Board as to such charges, and bars the admission in evidence of acts upon which such charges

were based. No other ruling is possible if the promotion of "industrial peace" is the policy and purpose of the Act.

International Machinists vs. NLRB, 326 U. S. 411.

Promotion and stabilization of industrial peace truly requires that withdrawal of the charge shall once and for all end all proceedings thereon. Any other rule means withdrawal is conditional only, not absolute.

(3) The broad unlimited order of the Board, as affirmed by the Circuit Court of Appeals, enjoins Petitioner from, "in any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Sec. 7 of the Act." The Petitioner is also effectively enjoined, "from in any other manner discriminating against any other labor organization," even though there is no testimony that any other Union is involved. As this Court has pointed out in *NLRB vs. Express Pub. Co.*, 312 U. S. 426, 85 L. ed. 930 (reaffirmed in *Communication Workers of America vs. NLRB*, 326 U. S. 479), a Board order implemented by an enforcement order of the Circuit Court of Appeals, constitutes an injunction, and real and affirmative reasons — not possibilities — must be present in order to warrant broad injunctive relief.

The Board has no authority to restrain generally all other undefined unlawful practices, which it has neither found to have been pursued, nor positively found to be related to the proven unlawful conduct.

Communication Workers of America vs. NLRB, 362 U. S. 479, 4 L. ed. 2d 896.

Because of the broad scope of this order, the Petitioner can unwittingly find itself suddenly involved in contempt proceedings based upon acts entirely removed or unrelated to the conduct which the Board originally found Petitioner to have committed. This is a penalty that is not justified by the acts which Petitioner allegedly committed. As Courts have had occasion to point out, the Board has repeatedly found it proper to take a single offense as establishing a "generalized scheme" (*Communication Workers vs. NLRB*, supra), "proclivity" (*McComb vs. Jackson-*

ville Paper Co., supra, "pattern" (*NLRB vs. Brewery and Beer Distributor Drivers*, 3 Cir. 1960, F. 2d — (40 L.C. par. 66,752)) and thereby claim justification necessary to warrant wholesale blanket relief.

Such action, in our opinion, effectively overrules *NLRB vs. Express Publishing Co.*, 312 U. S. 426, 85 L. ed. 930. Relief granted to the Board in the form of an order must be supported by justification based upon fact, and by necessity appearing from the record itself. The substantial evidence in this case, based upon the record as a whole, fails to show either justification or necessity for an order of unlimited blanket scope. The whole purpose of the order as drafted is the *in terrorem* effect of making available to the Board the ready avenue of contempt proceedings. This result we do not believe to be compatible with the purposes of the National Labor Relations Act or compatible with the announced promotion of industrial peace as announced in this Court in *Local 1424 International Machinists vs. NLRB*, supra.

(4) 29 *U. S. C. A.* Sec. 158 (c) provides that the expressing of any views, argument or opinion, or the dissemination thereof, shall not constitute or *be evidence* of an unfair labor practice, if such expression contains no threat or reprisal, force or benefit. Yet, notwithstanding the statutory language the Board, as affirmed by the Circuit Court of Appeals, has admitted in evidence statements of opinions by Supervisors which contain no threat of discharge, promise of benefit, or threat of force. These statements are the August 14, 1959 statements of supervisor Wheeler to employee Kennedy and the conversations in October before the election between employee Arrington and supervisor Hill. "Bolstering" these privileged expressions of opinion by events which occurred more than six months prior to the filing of the charges here involved, the Board found evidence of union hostility on the part of the Employer, and by so finding concludes that the privileged statements of opinion constituted unfair labor practices and that the Petitioner had discriminatorily changed the working conditions of employee Stone because of his union activities. Such findings are not supported by substantial evidence on the record as a whole and constitute a denial to the Petitioner of its statutory rights which permit the ex-

pression of opinion and which bar evidence of acts occurring more than six months prior to the date of the filing of charges here involved, contrary to Sec. 10 (b) of the Act (29 *U. S. C. A.* §160 (b)).

(5) Notwithstanding the fact that employee Stone was hired primarily to do janitor work, plus some camera work and in his words "any building repair that needed being done" (17a), and although the record was clear that building maintenance work had always been subject to direct approval and order at the time of performance of the work and was not personally performed by the employee on his own initiative (63a), the Board found that Petitioner had deliberately and intentionally removed employee Stone from performing any maintenance work, because of Stone's connection with the Union. Evidence by Petitioner showed that Stone was regarded as a competent building repair man, that he was assigned to at least three projects of so-called building maintenance on and after the alleged discriminatory removal from maintenance work; that no other building maintenance work of any kind was performed by anyone else at Petitioner's building after the alleged removal of Stone from such work, and that there were no building maintenance projects actually scheduled to be commenced. We believe the finding of the Board in regard to Stone is not supported by substantial evidence on the record as a whole and is based upon claimed hostility of petitioner toward the Union, established as we have pointed out, by the time-barred evidence improperly introduced.

RELIEF PRAYED

We ask that this Court review the Judgment by writ of certiorari, and pray that the findings of the Board, as affirmed by the Circuit Court of Appeals, be set aside and the order of the Board finding that Petitioner has violated

the Act be reversed and the complaints heretofore issued be dismissed in their entirety.

Respectfully submitted,
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DATED: November 3, 1961.